DEPARTMENT OF JUSTICE

STATEMENT

OF

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BEFORE THE

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AND BUSINESS AND CONSUMER RIGHTS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

ANTITRUST ENFORCEMENT OVERSIGHT

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Good morning, Mr. Chairman and members of the Subcommittee. It is a pleasure for me to appear before you today on behalf of the Antitrust Division of the Department of Justice to discuss the Division and its enforcement activities to protect consumers and businesses through sound and vigorous antitrust enforcement.

As members of this Subcommittee appreciate, competition is the cornerstone of our Nation's economic foundation. Antitrust enforcement promotes and protects a robust free-market economy. It has helped American consumers obtain more innovative, high-quality goods and services at lower prices; and it has strengthened the competitiveness of American businesses in the global marketplace.

That is not the same as guaranteeing the success of any particular competitor; we are not in the business of picking winners and losers, or dictating how a market should be structured. Those decisions should be made by competitive market forces. The goal of antitrust enforcement is to ensure that unlawful agreements and other anticompetitive conduct do not distort market outcomes.

Antitrust enforcement has rightly enjoyed substantial bipartisan support through the years, and we appreciate this Subcommittee's active interest in and strong support for our law enforcement mission.

My testimony today will review developments in the Division's core enforcement programs and discuss policy and strategic initiatives undertaken over the last 15 months designed to strengthen the Division's enforcement capabilities.

Enforcement Activities

The Antitrust Division has three major enforcement programs: criminal, merger, and civil non-merger. Let me spend a few minutes detailing some of the Antitrust Division's work

since my confirmation last June in each of these three major enforcement areas.

Criminal Enforcement

In the area of criminal enforcement, we move forcefully against hard-core antitrust violations such as price-fixing and bid-rigging. During the last 15 months, the Antitrust Division has secured almost $125 million in criminal fines, convicted 24 corporations and 25 individuals, and sentenced 25 individuals to prison terms averaging 17½ months, continuing a trend toward more certain and longer prison terms for antitrust offenders. In the last year, record-breaking jail sentences have been imposed on defendants convicted of antitrust and related offenses. These include:

- On January 22, 2002, Austin "Sonny" Shelton, a former government official in Guam, was sentenced to 10 years in jail -- the longest antitrust-related jail sentence ever imposed -- for orchestrating a bid-rigging, bribery, and money laundering scheme involving FEMA-funded contracts. This case was prosecuted jointly by the Antitrust Division and the U.S. Attorney's Office in Guam, and was a model of inter-agency cooperation.

- On November 9, 2001, Melvin Merberg, a former New York City food company executive, was sentenced to serve more than five years in prison for his role in multi-million-dollar bid-rigging, fraud, and tax conspiracies that defrauded many New York-area public and non-profit entities, including: New York City public schools; Newark, New Jersey public schools; a Manhattan drug rehabilitation center; and Nassau County, New York jails. The fraudulent schemes affected contracts valued at more than $210 million.

The Division is not deterred in pursuing high-ranking corporate defendants engaged in illegal activity. For example, A. Alfred Taubman, former chairman of the board of Sotheby's Holdings Inc., is now serving a year and a day in prison, as well as paying a $7.5 million fine, for his role in a scheme between Sotheby's auction house and Christie's to fix the price of sellers' commissions at fine art auctions.

Restitution -- money retrieved by the Division that will go to compensate those affected by the conspiracies involved -- reached an all-time high of over $30 million in FY 2001, as a result of convictions in the Division's New York food distribution bid-rigging cases and in a bid-rigging case involving U.S.-funded construction projects in Egypt. In the New York-area food distribution case, we secured a record criminal antitrust restitution order of $22.5 million.

We are particularly pleased with our continuing success in rooting out international cartel activity, affirming our government's resolve to protect American consumers from unlawful cartels wherever they base their operations or conduct. During the past 15 months, 54 percent of corporations prosecuted have been foreign-based, and 37 percent of individuals prosecuted have been foreign nationals. The Division now has 99 grand jury investigations open, 39 of which have international implications. In this effort, we work in close cooperation with our counterpart enforcement agencies in Europe, Canada, and elsewhere. We expect to see even more progress through these collaborations now that the European Union has brought its corporate leniency program in closer alignment with ours.

We are determined to bring violators to justice; and we also want the level of our enforcement activity, including the fines and sentences, to send a powerful and unmistakable deterrent message to those around the world who would victimize American consumers and the American marketplace.

Markets where the Antitrust Division has brought recent criminal prosecutions include:

- industrial chemical markets for monochloroacetic acid (MCAA), used in the production of numerous commercial and consumer products, such as pharmaceuticals, herbicides, and plastic additives;
- industrial chemical markets for organic peroxides, used in the manufacture of polyvinyl
- chloride, low-density polyethylene, and most polystyrene products such as containers and

packaging;

- carbon cathode block, used in aluminum smelters or pots in the production of primary aluminum;
- US AID-funded construction projects for wastewater treatment in Egypt;
- nucleotides, used to enhance food flavor;
- magnetic iron oxide (MIO) particles, used in the manufacture of video and audio tapes;
- isostatic graphite;
- tactile tile;
- scrap metal;
- printing and graphics;
- automotive tooling;
- collectible stamp auctions; and
- automotive replacement glass.

Merger Enforcement

The merger wave of recent years has subsided dramatically from its dizzying heights of a few years ago. In the past fifteen months, we have received Hart-Scott-Rodino Act ("HSR Act") filings for roughly 1500 transactions, compared to over 4500 in each of the previous two fiscal years. Part of that reduction is due to the enactment of the Hart-Scott-Rodino Antitrust Improvements Act of 2000, which significantly raised the HSR filing thresholds. Even so, it is apparent that merger activity is down appreciably. The downturn in merger activity has been particularly acute in the telecommunications, media, and technology sectors -- all of which are areas of the economy in which the Division has been active.

Despite the slowdown, there are still many mergers that require careful review, and our

staff is working hard to ensure that those transactions are receiving appropriate levels of scrutiny. In the past 15 months, the Antitrust Division has opened 131 preliminary investigations, issued second requests for additional information to the parties in 27 of those investigations, and challenged 21 mergers. We have a number of important merger investigations ongoing, including investigations involving the DirecTV/Echostar merger, the AT&T/Comcast merger, and the Northrop Grumman/TRW merger. We will closely examine those transactions, and all mergers we review, for potential anticompetitive impacts on consumers.

Since June 2001, the Division successfully challenged 20 of the 21 transactions it deemed anticompetitive. Six of these matters were resolved by consent decree, nine through a "fix-it-first" restructuring, four were abandoned after the Division indicated that it would file suit, and one -- General Dynamics/ Newport News -- was abandoned after the Division filed suit. The Division was unsuccessful in seeking to block the Sungard/Comdisco merger, a transaction the Division asserted was likely substantially to lessen competition in the market for shared "hotsite" disaster recovery services.

The range of markets involved in these merger challenges includes airlines, airline reservation systems, banking, dairy processing, fresh bread, molded doors and doorskins, industrial rapid prototyping systems, electric power, college textbooks, computer-based testing, computer processing center "hotsite" disaster recovery services, and nuclear submarine construction.

Some of our significant merger challenges include:

- General Dynamics/Newport News. General Dynamics and Newport News were the only two nuclear-capable shipyards and the only designers and producers of nuclear submarines for the U.S. Navy. The two shipbuilders also led opposing teams to develop the next generation propulsion system for use in submarines and surface combatants, so-called electric drive. Our staff worked in close consultation with the Department of Defense, the only customer, in evaluating the transaction. Our complaint alleged that the combination would create a monopoly in nuclear submarine design and construction, and would substantially lessen competition for electric drive and surface combatants. After the parties terminated their merger agreement, Newport News received a second bid from Northrop Grumman, which did not raise significant competitive issues.

- Suiza/Dean. Suiza and Dean were dominant firms in several geographic markets for fluid milk processing and school milk markets. The parties agreed to divest eleven dairies to National Dairy Holdings, L.P. (NDH), a newly formed partnership that is 50 percent owned by Dairy Farmers of America Inc. (DFA), a dairy farmer cooperative. The parties also agreed to modify Suiza's supply contract with DFA to ensure that dairies owned by the merged firm in the areas affected by the divestitures would be free to buy their milk from sources other than DFA.

- United/USAirways. At the time of the transaction, United and US Airways were the second and sixth largest U.S. airlines. The Division concluded that US Airways was United's most significant competitor on densely traveled, high-revenue routes between their hubs, such as Philadelphia and Denver, as well as for nonstop travel to and from Washington D.C. and Baltimore, and on many routes up and down the East Coast. The acquisition would have given United a monopoly or duopoly on nonstop service on over 30 routes, where consumers spend over $1.6 billion annually, and would have substantially limited the competition it faced on numerous other routes representing over $4 billion in revenues. The parties abandoned the transaction after the Division indicated its intention to challenge it.

- 3D Systems/DTM. The Division concluded that the acquisition as initially proposed would have substantially lessened competition in the U.S. industrial rapid prototyping systems market by reducing the number of competitors in the U.S. market from three to two and limiting the dynamic competition that has resulted in lower prices to customers and technological improvements to rapid prototyping systems. Rapid prototyping is a process by which a machine transforms a computer design into three-dimensional objects, speeding the design process for everything from cellular phones to medical equipment. The Division filed suit to block the transaction, and subsequently reached a settlement with 3D Systems Corporation that allowed the company to go forward with its purchase of DTM Corporation, provided that 3D and DTM agreed to license their rapid prototyping patents to a company that will compete in the U.S. market. The settlement was designed to permit new entry by requiring 3D and DTM to license their rapid

prototyping-related patents to a firm that will compete in the U.S. market and that currently manufactures rapid prototyping equipment.

We have also been very active in cases related to our merger enforcement program, filing two cases against "gun-jumping" and other violations of the Hart-Scott-Rodino premerger notification and waiting period requirements. In our case against Computer Associates International, Inc. and Platinum Technology International, Inc., we charged that the parties, who had proposed to merge and had filed premerger notifications under the HSR Act, violated the requirements of the premerger waiting period, during which the parties must refrain from going forward with the merger pending antitrust review, as well as violating Section 1 of the Sherman Act. The parties had agreed that Platinum would limit the price discounts and other terms it offered its customers during the waiting period, and the Division alleged that Computer Associates had obtained premature operational control of Platinum.

By assuming control of Platinum before the expiration of the required waiting period, while we were investigating the legality of the proposed merger, Computer Associates prematurely reduced competition between the two companies. It is important that merging parties strictly adhere to the requirements of the HSR Act and maintain their companies as separate and independent firms during the HSR waiting period.

In April, the Division filed a proposed consent decree to settle the suit. The consent decree, which is awaiting entry by the court, requires the payment of $638,000 in civil penalties and prohibits Computer Associates from agreeing on prices, approving or rejecting proposed customer contracts, or exchanging prospective bid information with any future merger partner.

In another case of this type, filed in October against Hearst Corporation and its parent,

The Hearst Trust, we charged the company with failing to produce key documents before undertaking an acquisition subject to HSR premerger review. The Division filed this case, charging a violation of the HSR Act, at the request of the FTC, which was challenging the merger under section 7 of the Clayton Act. We charged that Hearst had violated the premerger notification requirements when it acquired Medi-Span Inc., an Indiana-based producer of integratable drug data files, in 1998 without submitting to the antitrust enforcement agencies documents required to be supplied along with its premerger notification. Hearst and its parent agreed to pay $4 million to settle the HSR charges, the largest civil penalty a company has ever paid for violating antitrust premerger requirements, and the court approved the settlement.

Civil Non-merger Enforcement

Let me now turn to civil non-merger enforcement. These are cases, other than criminal prosecutions, that are based on anticompetitive conduct under the Sherman Act. We have been very active in this area as well, with several cases in various stages of litigation.

As the Subcommittee is well aware, the Division's most visible conduct case is the Microsoft case. Within days of my arrival at the Division, the court of appeals rendered its decision, substantially reversing the district court's findings of liability that had formed the basis for a court-ordered breakup of the company. The court of appeals sustained DOJ's position with regard to 12 of the 20 specific acts of monopoly maintenance discussed in the opinion, but reversed the liability findings on tying, attempted monopolization and eight allegations of monopoly maintenance. Earlier in the case, the district court had dismissed allegations of monopoly leveraging and exclusive dealing. The court of appeals also vacated the remedy and ordered a hearing on the remedy before a new judge. Based upon that opinion, the Division

opposed Microsoft's requests for intermediate appellate review and pressed for the earliest possible resumption of proceedings before the newly assigned trial judge. Judge Kollar-Kotelly granted our request for an early hearing, but ordered the parties to first undertake a period of around-the-clock, supervised mediation. The mediation resulted in a proposed settlement between the Division, Microsoft, and half of the state plaintiffs. The proposed consent decree is undergoing Tunney Act review. On July 2, 2002, the district court ruled that the Division had fully complied with the Tunney Act requirements. We are now awaiting the court's public interest determination.

In our view, the proposed consent decree represents a complete and fully successful resolution of the case, in that it enjoins the conduct found to be unlawful, prevents recurrence of that conduct, and takes proactive steps to restore lost competition. Moreover, it provides for immediate relief, in that Microsoft agreed to be bound by the decree's terms upon signature. Consequently, Microsoft has already modified its licensing practices to permit computer manufacturers to substitute competing middleware products for those provided as part of its operating system, modified its new XP operating system, and begun to release important interfaces and protocols that will enable third-parties to develop products and services that will interoperate with Windows.

In the case against American Airlines for monopolizing certain routes into and out of its hub at Dallas-Fort Worth International Airport, we are pursuing an appeal from the district court's dismissal of the complaint, with oral argument in the circuit court scheduled for September 23. In the case against Visa and MasterCard, we are defending against an appeal challenging the district court's finding of partial liability. The court found against the Division

on its challenge to the dual governance structure, permitting member banks to simultaneously participate in management of both networks, but found for the Division on its challenge to the practice of prohibiting members from issuing competing cards. In the case against Dentsply International for unlawfully maintaining its monopoly in the market for artificial teeth, we completed the evidentiary phase of trial in late May. We have filed post-trial briefs and proposed findings of fact and conclusions of law, and closing argument is scheduled for tomorrow, September 20.

One of our most recent civil non-merger cases is a suit against The MathWorks Inc. and Wind River Systems Inc. to stop them from illegally allocating the markets for software used to design dynamic control systems. Dynamic control system design software enables engineers to develop the computerized control systems of sophisticated devices, such as anti-lock braking systems for automobiles, guidance and navigation control systems for unmanned spacecraft, and flight control systems for aircraft. High-technology products like these work behind the scenes to help build some of the most sophisticated products in our economy. The crux of our complaint was that the "licensing" arrangement between the parties operated primarily to force the exit of the Wind River product from the market and to prevent it from re-emerging in the hands of some other party.

We filed a proposed consent decree with the court as to Wind River at the time we filed our original complaint in June. In August, the Division and The MathWorks reached a settlement agreement that requires The MathWorks to offer for sale Wind River's design control software assets.

Also on the civil non-merger front, we have made antitrust enforcement in the joint

venture area a high priority for the Division. Many firms are turning to joint ventures as an alternative to mergers. They can be a preferred form of business coordination due to stock market or other considerations. Moreover, joint ventures are increasingly being used by incumbents in seeking to commercialize new technologies in adjacent markets.

Joint ventures can be procompetitive, in that collaborative activity may enable firms to develop new products or bring products to market more quickly or more efficiently than the partnering firms acting individually. Nevertheless, joint ventures are a form of competitor and vertical collaboration that warrants close antitrust scrutiny. In analyzing joint ventures, we will examine whether they reflect a sufficient level of integration among the participants to support the extent of their collaboration, as well as whether the procompetitive benefits associated with the joint venture outweigh its anticompetitive risks.

Because joint ventures can raise competitive concerns, and because, unlike mergers, there are no notification and waiting period requirements, we have taken steps to position the Department for improved joint venture enforcement. Enhanced joint venture and conduct enforcement was an important goal of our structural reorganization and modernization initiatives last fall, in that they were designed to assign specific industry responsibilities to specific sections and attorneys within the Division. In this way, our enforcement sections are tasked with monitoring business activity within the industry sectors to which they are assigned, so as to more quickly identify conduct suggesting antitrust scrutiny. The sections are also tasked with affirmative outreach in their industry sectors. We have made aggressive outreach efforts in industries in which joint ventures tend to proliferate, including media and entertainment, agriculture, health care, and information technology. Since my arrival at the Division, we have

launched a number of important joint venture investigations involving, among other things, on-line media, financial services, and electronic air passenger ticketing.

International Initiatives

Increased globalization is one of the dramatic changes taking place in our economy that is creating new challenges for antitrust enforcement. With corporations and corporate alliances stretching across the globe, we must work with antitrust enforcers abroad to forge an effective cooperative relationship based on our core beliefs in competition. We must seek convergence in procedure and substance wherever possible, to minimize the cost, complexity, and sheer uncertainty of enforcement and compliance that could otherwise become a major hindrance to procompetitive business activity and economic growth.

For a number of years people have talked about the need for cooperation and collaboration. Now the Antitrust Division is taking aggressive steps to turn this talk into action. We have already made substantial progress and hope and expect to continue and expand that success in the future. In particular, we have strengthened our cooperative relationships with foreign antitrust authorities and worked hard promoting convergence in enforcement policies. For the first time, we have dedicated one Deputy Assistant Attorney General exclusively to international issues.

European Union

The EU currently stands as the most important antitrust enforcer outside our borders. There have been limited occasions when we haven't seen eye-to-eye with the EU. Ironically, our experience with the GE/Honeywell merger has served as a catalyst for making our relationship with the EU more substantive and more action-oriented than ever before. As a

result, both sides agree that the relationship has been strengthened and improved. Despite our different legal traditions and cultures, and despite substantial differences in the language of our governing laws, we have been able to develop largely consistent competition policies, built on sound economic foundations directed at the goal of promoting consumer welfare through competition.

It is important that other jurisdictions do not base antitrust enforcement policy on the fear that one firm's enhanced efficiency could disadvantage its competitors. Such a policy is incompatible with the fundamental precept that antitrust should protect competition, not competitors. We have both publicly and privately presented this view at every opportunity, thereby putting the issue forward to debate and consideration in Europe and elsewhere. We are pleased that the EU has reaffirmed its commitment to consumer welfare, in the form of lower prices, higher output, and enhanced innovation, as the ultimate goal of sound competition policy, and has made clear that, like us, it views economic efficiency positively and will not punish firms for taking steps to become more efficient.

The EU also currently is reviewing its merger policies. It recently asked for comments in a so-called "Green Paper" on a broad range of issues, including on the substantive standards it should apply to mergers. Moreover, the EU is undertaking to adopt comprehensive merger guidelines, as we did decades ago.

One vehicle we are using to pursue our shared goals is our U.S.-EU Merger Working Group, which we reinvigorated last September following our divergence on the GE/Honeywell transaction to examine several issues, including merger process and timing, conglomerate mergers, and the role of efficiencies in merger analysis. We are close to reaching agreement

through this Working Group on best practices for coordinating merger investigations subject to both U.S. and EU review. These best practices are designed to minimize the risk of divergent outcomes, facilitate coherence and compatibility in remedies, enhance investigative efficiency, and reduce burdens on those subject to multiple antitrust reviews.

An additional area in which we have made great progress toward convergence with the EU is corporate leniency. The Division's Corporate Leniency Program -- which provides for no prosecution for companies and their executives who are the first to come forward, cooperate, and meet the program's other requirements -- has played a major role in cracking the majority of the international cartels that the Division has prosecuted. The extraordinary success of this program to date has generated widespread interest around the world. As a result, we have advised a number of foreign governments in drafting and implementing effective leniency programs in their jurisdictions. We were particularly pleased when the EC revised its leniency program in February to establish a more transparent and predictable policy along the lines of our own policy. The adoption of effective leniency programs by foreign antitrust enforcers can be tremendously beneficial to our own enforcement efforts, by making it more likely for a firm to come forward to report antitrust violations, since the firm can also receive leniency in other jurisdictions in which it might be prosecuted.

Emerging Antitrust Regimes

There are now nearly 100 national and regional antitrust regimes in the international arena, with roughly 65 of those requiring some form of premerger notification. While in one sense this is the result of our sustained efforts to encourage other countries to adopt and enforce antitrust laws, the assertion of overlapping antitrust jurisdiction by multiple sovereigns has the

potential to harm some of the very competitive values that antitrust is meant to protect. As the nations of the world adopt and implement their own antitrust laws, we need to continue exercising leadership to prevent antitrust enforcement from being misused as a tool of industrial policy or protectionism and thereby jeopardizing the strong public and political support for sound and vigorous antitrust enforcement.

Last October we, along with the FTC, were among the lead jurisdictions in launching the International Competition Network, to develop guiding principles and best practices to be endorsed, and then implemented voluntarily. The ICN now includes 65 jurisdictions on six continents, representing over 70 percent of the world's GDP.

The ICN exists as a "virtual" network through which agency heads commission and guide the efforts of working groups focused on specific competition law issues. The working groups themselves are directed by government personnel, but receive input from a broad range of sources, including international organizations, academics, industry groups and leaders, and private practitioners. Recommendations by the working groups will be considered by the ICN members, but implemented, if at all, through separate governmental initiatives. The ICN itself will not be a forum for reaching binding international agreements.

Our convergence efforts with other competition authorities around the world are based on six principles:

- Protect competition, not competitors.
- Recognize the central role of efficiencies in antitrust analysis.
- Base decisions on sound economics and hard evidence.
- Acknowledge the limits to our predictive capabilities.

- Be flexible and forward-looking.
- Impose no unnecessary bureaucratic costs.

The ICN has initiated two major projects in the first year of its existence. First, under the leadership of the Antitrust Division's Deputy Assistant Attorney General for International Enforcement, a Merger Working Group is dealing with several aspects of the difficult issues raised by multi-jurisdictional merger review, including merger notification and review procedures, the various analytical frameworks used around the world for reviewing mergers, and investigative techniques.

A subgroup of 13 agencies has recommended that the entire ICN adopt broad guiding principles involving such things as transparency of merger processes, non-discrimination on the basis of nationality, and efficient, timely, and effective merger review. This subgroup has also recommended that the ICN adopt more technical "recommended practices" such as that there should be a sufficient nexus between the transaction and the reviewing jurisdiction, and that there should be clear and objective notification thresholds. If adopted and implemented by ICN members, we will have made an important beginning in rationalizing the current thicket of multi-jurisdictional merger enforcement, in a way that well serves the competitive process worldwide. With respect to improving merger investigative processes, later this fall we will host a conference here in Washington for merger officials from dozens of countries, with the goal of increasing understanding and pursuing healthy convergence in the practical aspects of our various merger regimes.

With respect to the second ICN initiative, the head of the Mexican antitrust agency heads a working group on the very important subject of competition advocacy, a subject that is of

particular importance to developing countries and countries in transition. This working group will produce a comprehensive report on the practice of competition advocacy in 50 ICN jurisdictions, an unprecedented effort that should form the basis for, among other things, deriving recommended practices for competition advocacy.

And that's just the beginning. We will move on to new projects in the coming year, with the goal of further rationalizing multi-jurisdictional review and other aspects of international antitrust enforcement.

Policy Initiatives

We are undertaking work on a number of policy initiatives to ensure that we are not only up-to-date with current legal and economic analysis, but also looking to the future to prepare ourselves for the challenges that come with changes to our economy. We are reviewing the economic and legal premises underlying several areas of enforcement policy, including intellectual property and antitrust, remedies, coordinated effects in merger enforcement, and certain discrete aspects of HSR premerger notification.

Intellectual Property Hearings

In recent years intellectual property issues have arisen with increased frequency in our merger and civil conduct investigations and enforcement actions. While intellectual property and antitrust law share the common purpose of promoting dynamic competition and thereby enhancing consumer welfare, issues at the intersection of intellectual property and antitrust can be murky. More than ever before, the creation and dissemination of intellectual property is the engine driving economic growth. Consequently, as antitrust law addresses the competitive implications of conduct involving intellectual property, and as intellectual property law

addresses the nature and scope of intellectual property rights, care must be taken to maintain proper incentives for the innovation and creativity on which our national economy depends.

Both we and the FTC believed that a thorough review of the issues in this important area should be undertaken. We decided to hold joint hearings, with the involvement of the U.S. Patent and Trademark Office, on enforcement policy issues at the intersection of antitrust and intellectual property law. The hearings, which began in February and will be completed in the fall, have drawn from a broad cross-section of business leaders, legal practitioners, economists, and academic experts with extensive experience in these areas. We expect to publish a report in 2003, which we hope will provide new insights into the effects of competition and patent law and policy on innovation and other aspects of consumer welfare.

Remedies

The topic of remedies in merger enforcement has increasingly been discussed by members of the bar and the business community. As more and more cases, especially merger cases, were being resolved through consent decrees, remedies became a larger and larger focus of importance. The Microsoft case also raised substantial issues and debate regarding remedies in civil conduct cases.

I decided that the Division needed to undertake a thorough review of this important component of antitrust enforcement. As a result, the Division is looking at the entire remedy process, examining our guiding principles and the legal and economic basis for imposition of particular remedies, as well as administrative issues. After all, it does little good to challenge a practice or a merger as anticompetitive if the remedy you end up with at the end of the day does not protect and preserve competition -- or worse yet, if the cure is worse than the disease.

Coordinated Effects

Another ongoing policy initiative is our review -- or, rather, rediscovery -- of coordinated effects analysis. In recent years we have seen the emergence of unilateral effects as the predominant theory of economic harm pursued in government merger investigations and challenges. Unilateral effects, which focuses on the potential for the merged firm to exercise market power on its own, while a viable theory of harm, should not be the theory of choice simply by default. If we reach too quickly for unilateral effects theories to the exclusion of meaningful coordinated effects analysis -- which focuses on the potential for the merged firm to exercise market power in coordination with other firms in the market -- we might miss important cases that should be brought, or craft our relief too narrowly in cases that we actually pursue.

As a result, for the last several months I have had a team of lawyers and economists looking closely at coordinated effects analysis. Throughout this process of rediscovering coordinated effects, we will continue to draw upon the prevailing economic literature, case precedent, and case experience, as well as share our perspectives with our colleagues at the Federal Trade Commission, who are undertaking a similar endeavor. We hope that as a result of our efforts we will sharpen our analytical abilities with respect to coordinated effects analysis and enhance our effectiveness in presenting coordinated effects cases in court.

HSR Gun-jumping

An additional area that we are reviewing and in which we hope to provide additional guidance to the public is gun-jumping. The HSR Act requires that merging parties observe a mandatory 30-day waiting period (15 days in the case of a cash tender offer), after which the companies may proceed with the transaction if neither the Department of Justice nor the Federal

Trade Commission requests additional information about the transaction. A primary purpose of the HSR waiting period is to prevent merging parties from combining during the pendency of an antitrust review, so that they remain separate and independent actors during that time. Section 1 of the Sherman Act, in turn, prohibits any contract, combination or conspiracy in restraint of trade. The pendency of a proposed merger thus does not excuse the merging parties of their obligations to compete independently. As a result, pending the consummation of a merger, a merging firm that attempts to or in fact controls or influences the decisions of its merger partner with regard to price, output, or some other competitively significant matter may be acting in violation of Section 1. We know that additional clarity concerning the Division's views on this issue would be helpful to the public, and as such, we have undertaken a review of this issue. In the coming months we hope to provide additional guidance on the types of pre-consummation activities that may or may not be advisable under controlling legal precedent.

I will not detail all of our other analytical initiatives, but I would note that because so many of our enforcement actions are resolved by consent, before a court has the opportunity to render a decision, it is all the more important that we undertake this kind of critical examination periodically to ensure that the actions we bring and the remedies we seek are on as sound a doctrinal and practical footing as possible.

Strengthening the Division's Enforcement Capabilities

We are determined to uphold the high caliber of enforcement for which the Division is known. To that end, after consulting with knowledgeable people in the Division, as well as with former antitrust officials, and experienced antitrust practitioners, we have adopted a number of initiatives designed to strengthen the enforcement capabilities of the Division, including a

reorganization and modernization, adopting a merger reform process initiative, increased and improved training, increased cooperation with the FTC, and adopting and expanding best practices.

Reorganization and Modernization

We sought and obtained congressional authorization earlier this year to implement a modernization effort consisting of structural and operational improvements. This effort is the first congressionally approved reorganization and modernization of the Division in more than two decades. It is designed to improve our effectiveness as enforcers by concentrating industry expertise within particular sections of the Division and giving those sections broad enforcement responsibility for both civil merger and non-merger matters.

Under the previous, more function-based structure, multiple sections shared enforcement responsibilities for certain industries and commodities, with some sections focusing mostly on merger enforcement, and other sections concentrating on civil non-merger investigations. Business review requests in those industries and commodities, in turn, were handled in yet another part of the Division. The Division was already finding this function-based structure cumbersome, and in recent years had begun to move away from it in practice. The new structure concentrates investigatory and enforcement expertise and resources for particular industries and commodities within a particular section.

The modernization effort also recognizes the emerging importance of certain areas of the economy -- including information technology, media, telecommunications, and industries characterized by network competition -- and the need for concentrated, focused expertise in these industries. The new structure is strengthening areas of responsibility, sharpening lines of

reporting, increasing accountability, and ultimately improving efficiency and productivity in carrying out the Division's mission, positioning us to better address the challenges of the New Economy in the 21st Century while strengthening enforcement capability in traditional industries.

Merger Review Process Initiative

The Merger Review Process Initiative implemented last fall is designed to promote quicker identification of critical legal, factual, and economic issues, more efficient and focused discovery, and more effective evaluation of evidence. Division staff will be able to better tailor the investigation to the particular transaction, and are encouraged to consult regularly with the parties and to explore ways to reduce unnecessary burden and expense. In appropriate circumstances that could mean agreeing to special procedures that meet the convenience and needs of the parties in exchange for the parties' cooperation in discovery. Mergers always will be a significant portion of our work and this initiative is vital to putting in place a winning merger enforcement strategy that enables us to efficiently prevent anticompetitive mergers, while not imposing unnecessary costs on businesses and the economy.

Best Practices

Following on the broad framework for investigations set forth in the Merger Review Process Initiative, we are in the process of developing, evaluating, and institutionalizing a more specific set of internal best practices for conducting merger investigations. This project will result in the creation of a best practices manual that will be a valuable tool for our staffs. The type of "self-benchmarking" reflected in the best practices initiative will allow us to embrace merger techniques that have proven successful in real investigations, while eliminating techniques that have proven unproductive.

Cooperation with the FTC

We have a number of broad-ranging efforts in cooperation with the FTC on-going, including the joint IP hearings, a joint DOJ/FTC/EU IP Working Group, the DOJ/FTC/EU Merger Working Group, joint efforts on a variety of HSR issues, best practices efforts, and a variety of others. Chairman Muris and I also remain committed to making the clearance process as efficient and effective as possible. I think I can safely say that the cooperative relationship between the two agencies has never been better.

Training

In any effort to strengthen enforcement capabilities, a central focus must always be training, so that enforcers will have the skills and ability necessary for maximum effectiveness. We have improved and expanded in-house courses covering substantive and procedural areas of antitrust law, general lawyering skills -- particularly for new attorneys -- and complex economic topics that are critical to accurate antitrust analysis in today's economy. This past winter we conducted what we anticipate will become an annual event -- the Division's Antitrust Institute -- an intensive three-day course for more junior attorneys and economists that are new to the Antitrust Division. The Antitrust Institute is designed to kick off a structured three-year training plan for new attorneys and economists that combines lectures on theory with "practice by doing" exercises. These initiatives will ensure that our attorneys and economists will develop into skilled antitrust enforcers.

Conclusion

Mr. Chairman, the men and women of the Antitrust Division approach our critical mission to enforce the U.S. antitrust laws with the utmost seriousness. Since my arrival here last

June my singular goal has been to continue the excellent work that has always been done by the Division, while positioning the agency to meet the challenges of the future. Given the important role we assign to competition in our nation's economy, the Antitrust Division must be a vigorous, formidable, and effective enforcer of our laws. While I am quite pleased with all that we have accomplished thus far, I recognize that the hallmark of any successful organization is the continuing desire to improve. In that regard I look forward to working with this Subcommittee and its staff.